Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI; MEMBERS OF THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, Individually and in Their Official Capacities, et al.,

Petitioners,

vs.

CHARLOTTE HOROWITZ,

Respondent.

BRIEF FOR RESPONDENT

ARTHUR A. BENSON II
2525 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Statement of the Case 1

Summary of Argument 11

Argument—

I. Respondent, a Medical Student in a Public Institution, Is Entitled to Due Process Before Dismissal From School Where the Dismissal Deprives Her of an Interest in Liberty by Foreclosing Educational and Career Opportunities 16

Introduction 16

A. Respondent Is Entitled to a Due Process Hearing Before She Is Deprived of Her Interest in Liberty 18

B. The Characterization of the Dismissal As Academic or Disciplinary Is Not Relevant to the Question of the Requirement of Due Process 24

C. The Nature of the Due Process Hearing Required 33

D. Requiring a Due Process Hearing Will Not Entangle the Judiciary in Educational Evaluations 37

II. Petitioners Failed to Provide Respondent With Due Process and Her Summary Dismissal Was Arbitrary and Capricious 41

Introduction 41

A. The Medical School Failed to Follow Its Own Rules and Regulations in Dismissing Horowitz 42

B. The Medical School Summarily Excluded the "Deceleration" Option 46

C. The Medical School Arbitrarily Changed Its Standards of Evaluation and Applied Them Ex Post Facto 47

D. The Dismissal of Horowitz Was Especially Arbitrary and Capricious 50

Conclusion 53

Table of Authorities

Cases

Behagen v. *Inter-Collegiate Conference of Faculty Representatives*, 346 F.Supp. 602 (D.Minn. 1972) 42

Betts v. *Board of Education*, 466 F.2d 629 (7th Cir. 1972) 39

Bishop v. *Wood*, 426 U.S. 341 (1976) 12, 18, 19, 20

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 12, 18, 19, 20, 21, 25

Brookins v. *Bonnell*, 362 F.Supp. 379 (E.D.Pa. 1973) 29, 31

Connelly v. *University of Vermont and State Agriculture College*, 244 F.Supp. 156 (D.Vt. 1965) 17, 28

Gaspar v. *Bruton*, 513 F.2d 843 (10th Cir. 1975) 25, 26

Goss v. *Lopez*, 419 U.S. 565 (1975) 13, 24, 33, 39

Greenhill v. *Bailey*, 519 F.2d 5 (8th Cir. 1975) 42

Horowitz v. *Board of Curators*, 538 F.2d 1317 (8th Cir. 1976) 12, 14, 16, 23, 34-35, 40, 41

Ingraham v. *Wright*, ... U.S. ....., 97 S.Ct. 1401 (1977) 20, 25, 33

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951) 31, 36, 40

Keys v. *Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973) 27, 28

Lukacs v. *Curators of the Univ. of Missouri*, No. 74CV109-2 (W.D.Mo. July 23, 1974) 40

Mahavongsana v. *Hall*, 529 F.2d 448 (7th Cir. 1976) 26, 27

Matthews v. *Eldridge*, 424 U.S. 319 (1976) 32, 34, 35, 36, 37

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 20

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 34

Paul v. *Davis*, 424 U.S. 693 (1976) 19

Perry v. *Sindermann*, 408 U.S. 593 (1972) 21, 49

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1956) 12, 21

Service v. *Dulles*, 354 U.S. 363 (1957) 42

Werren v. *National Association of Secondary School Principals*, 375 F.Supp. 1043 (N.D.Tex. 1974) 42

Other Authorities

Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa.L.Rev. 545 (1971) 17

Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J. Law-Ed. 277 (1976) 23, 40

Developments in the Law—Academic Freedom, 81 Harv.L.Rev. 1045 (1968) 23

Fuller, *The Adversary System*, Talks on American Law 35 (Berman ed. 1972) 39

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI; MEMBERS OF THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, Individually and in Their Official Capacities, et al.,

Petitioners,

vs.

CHARLOTTE HOROWITZ,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Charlotte Horowitz, the Respondent, was admitted to the Medical School of the University of Missouri-Kansas City with an outstanding record of scholastic accomplishments, achieved a brilliant academic success at the Medical School, and was dismissed from the School just weeks before her class was to graduate.

Horowitz was admitted to the Medical School in the Fall of 1971 as an advanced standing student (App. 10, Stips. 22-24) in part because of her outstanding scholastic credentials, including a Bachelor's degree in Chemistry

from Barnard College, a Master's degree in Psychology from Columbia University, and graduate work at Duke University and the National Institutes of Health, where she had a 3.8 grade point average on a 4.0 scale. (App. 6-7, Stips. 8 and 10) The scores of Horowitz on the Graduate Record Exam all exceeded the ninety-ninth percentile (App. 7, Stip. 9) and her scores on the Medical College Admissions Test were also outstanding. (App. 7, Stip. 12)

These academic achievements were supported by recommendations from people who were familiar and impressed with her work. The Chief of the Unit on Analytical Biochemistry of the National Institute of Mental Health described Horowitz as ". . . one of the most gifted persons, postdoctoral or nondoctoral, on the NIH campus . . . . she is capable of functioning on a par with some of the best NIH scientist-physicians." (App. 8-9, Stip. 18) Horowitz was also described as "extraordinarily intelligent and diligent" and as having "great drive and initiative." (App. 9, Stip. 19)

Upon entering U.M.K.C., Horowitz took the National Board Mini-Test, scoring first in the school in basic science and second in clinical studies. (App. 11, Stip. 27) She also took the Minnesota Multiphasic Personality Inventory, a psychological test which measures, among other factors, mental maturity and emotional stability. Horowitz tested within the normal range for all clinical test categories. (App. 11, Stip. 28)

Studies at the Medical School were divided into rotations, the docent unit being Horowitz's first rotation from September, 1971 through November, 1971. (App. 11, Stip. 29) The docent rotation at U.M.K.C. Medical School is the primary educational block of the curriculum where each student has frequent and close contact, within a small group of students, with a faculty member, the docent.

The docent maintains this close relationship with the same small group of students throughout their years of instruction.

During her first year at the Medical School, approximately equivalent to the third year in a traditional four-year school, Horowitz received credit for all six (6) rotations. Dr. William Sirridge, who as Horowitz's docent oversaw and directed her education (App. 97, Tr. 101), recommended her for advanced standing as a year VI student in a letter and evaluation report of June 9, 1972 finding her above average in all respects. (App. 14-15, Stips. 42, 43; P.Ex. 32, Tr. 136)

In June, 1972 a series of meetings began which culminated in Horowitz being placed on probation. She was neither informed of, invited, nor permitted to attend any of the meetings of the Council on Evaluation or of the Coordinating Committee, which were evaluating her performance, nor was she allowed to submit any documents or arguments in writing on her own behalf. (App. 124, 116, Tr. 236, 202, 206) As a result of this evaluation procedure, Horowitz was sent two letters on July 5, 1972 from Dean Noback. The first was a memorandum listing the class designations for advanced standing students noting that Horowitz had been elevated to year VI, the most advanced of the student classifications, representing the final year of medical school. (P.Ex. 35, Tr. 18)

The second letter to Horowitz reiterated the substance of a prior conference at which she was informed that she was being placed on probation, but was advanced pursuant to schedule. (P.Ex. 36, Tr. 18) Dean Noback gave the following reasons for placing Horowitz on probation:

> "Your acquisition of information is good. Your relationship with others has not been good and represents

> a major deficiency. You need to improve your relationship with others rapidly and substantially. This involves: Keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance including hand washing and grooming; participating appropriately in the activities of the School; and directing criticism and suggestions maturely to your Docent and to the faculty member who is in charge of a curriculum block as you may have criticisms and suggestions."

(P.Ex. 36, Tr. 18) No mention was made of the clinical competence of Horowitz.

Shortly after these letters her docent, Dr. William Sirridge, wrote a letter of recommendation dated August 10, 1972 indicating that Horowitz had the highest class standing. (P.Ex. 39, Tr. 18) In another letter of recommendation dated August 17, 1972, written to Menninger Clinic at the request of Horowitz in respect to her application seeking admission into the clinic's residency program in psychiatry, Dr. Sirridge said he had no hesitancy in recommending her for a straight internship in psychiatry. (P.Ex. 40, Tr. 18)

The following Fall, 1972, Horowitz ranked first on her National Board Examination Part I. (App. 17, Stip. 51) During that Fall Horowitz was in her docent unit rotation and was evaluated for the first time by her docent as having unsatisfactory clinical skills but was highly satisfactory and superior in all other categories. (App. 17, Stip. 50; P.Ex. 95, Tr. 18) She received credit for the rotation (App. 17, Stip. 49) and for all rotations taken during the Fall and Winter of 1972.

During her obstretrics/gynecology rotation, for which she also received credit, she was informed, on January

26, 1973, that the Council on Evaluation had recommended that she not graduate in May of 1973. (App. 18, Stip. 57) Further, on February 7, 1973, she was informed in writing that the Coordinating Committee had met and accepted the recommendation of the Council on Evaluation that she not graduate. (App. 18, Stip. 58; P.Ex. 53, Tr. 18) She was informed that if she was dissatisfied with this decision, she could take a set of oral and practical examinations. This letter stated that Horowitz must make "very marked and very substantial improvement" in the areas of "clinical competence, peer and patient relations, personal hygiene and ability to accept criticism."

By letter of February 9, 1973, Horowitz elected to exercise the option of practical exams. (App. 19, Stip. 59) After procedures were created for the practical exams, none having existed before this date, Horowitz was notified on March 15, 1973 that she was to be examined by seven physicians who had been instructed to "provide a careful, detailed and thorough assessment of (her) abilities . . ." (App. 19, Stip. 60; P.Ex. 57, Tr. 18) That same day the seven doctors were sent letters explaining the process by which Horowitz would be examined (P.Ex. 58, Tr. 18; D.Ex. 22, App. 208) and Dean Noback prepared a memorandum which described the method of tallying the results of the seven physicians' examination. (P.Ex. 59, Tr. 189) As the Court of Appeals found: "The Dean informed the seven physicians by letter and a meeting that they were to make one of three recommendations: a) graduation on schedule; b) continued probation and reassessment of her status in May, 1973; c) dismissal from the medical school." 538 F.2d at 1320. (App. 52)

The seven doctors each sent letters regarding their evaluations of her. (P.Ex. 60, 61, 63, 64, 65, 66, 68, Tr. 35, 202) Although the letters of the doctors do not easily

fit into categories, it is evident that four of the seven doctors recommended that Horowitz either be allowed to graduate or remain in school on probation. These evaluations and recommendations did not follow the categories of recommendations specifically set out in Dean Noback's letter to the doctors (App. 73, Tr. 47-48; P.Ex. 59, Tr. 189) nor were the evaluations tallied pursuant to Dean Noback's tallying procedure. (App. 73, Tr. 47-48; P.Ex. 59, Tr. 189) The procedure for tallying the results of the recommendations (P.Ex. 59, Tr. 189) required the Dean to call the seven examining physicians together to discuss their evaluations and to resolve differences of opinion, if there was no clear majority evident from their letters. As the Court of Appeals found: "Although there was no clear majority opinion the panel was not called together as the procedures contemplated." 538 F.2d at 1320. (App. 52)

During the Spring of 1973 Horowitz continued to receive credit for her rotations, obstetrics/gynecology and surgery. (App. 20, Stip. 68; P.Ex. 83, Tr. 183) Quarterly exams were given in May, 1973 on which Horowitz ranked second in her class in total score and first or second in her class on fourteen of the thirty testing categories. (App. 25-26, Stip. 94)

The Council on Evaluation met May 1, 1973 and voted that Horowitz would not graduate in May, 1973. (App. 20, Stip. 66; P.Ex. 67, Tr. 18) The Coordinating Committee on May 7, 1973 voted to sustain the Council's recommendation that she not be allowed to graduate. (App. 21, Stip. 71; P.Ex. 69, Tr. 18) Following the decision of the Coordinating Committee on May 7, 1973, Dr. Sirridge, Dr. Smull and Dr. Noback met with Horowitz to tell her that both the Council on Evaluation and the Coordinating Committee had met and decided that her appeal to graduate would

be denied and she would not graduate at that time. No mention was made of dismissal. This meeting was confirmed by two letters dated May 11, 1973. Next the Council on Evaluation met on May 14, 1973 without notice to Horowitz (App. 17, Stips. 52, 53) and recommended that Horowitz not be allowed to re-enroll barring receipt of reports that she had improved radically. (App. 21, Stip. 72) On May 18, 1973 Dean Noback sent another letter to Horowitz reiterating their discussion of May 7, 1973 and informing her that the Council on Evaluation would be meeting at some time to consider the extent to which she had improved. (P.Ex. 71, Tr. 18) No mention was made of the possibility that Horowitz might be dismissed from the Medical School.

On May 28, 1973, the Council on Evaluation without any notice to Horowitz (App. 17, Stips. 52, 53) voted to dismiss Horowitz from the Medical School. (App. 21, Stip. 73; P.Ex. 77, Tr. 18) On June 4, 1973 the Coordinating Committee accepted the recommendation of dismissal (App. 22, Stip. 77; P.Ex. 78, Tr. 18), which was in turn upheld by Dean Noback. On July 6, 1973 Dean Noback formally informed Horowitz that she had been dismissed from the University of Missouri at Kansas City School of Medicine. (App. 22, Stip. 78, P.Ex. 96, Tr. 18)

Horowitz was dismissed from the Medical School for having allegedly failed to make adequate progress with regard to four areas, one arguably academic and three behavioral. In a letter from Dr. Smull to Dr. Noback (P.Ex. 49, Tr. 211) the alleged deficiencies of Horowitz were listed as clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism. Although Horowitz has consistently denied these behavioral charges and although Dr. Dennis in his deposition stated that the allegations were of questionable validity,

Horowitz has never been given an opportunity to appear at a hearing and rebut them. (App. 17, Stips. 52, 53) In this regard, Dr. Marjorie Sirridge, a member of the Coordinating Committee which finally made the recommendation that Horowitz be dismissed, stated for the minutes of the meeting on June 4, 1973 (P.Ex. 78, Tr. 18) that she believed Horowitz, from the beginning date of her medical education, had been the victim of prejudice by faculty, staff and examiners, and she testified that because Horowitz was a woman she had been held to higher standards than other students. (App. 81-84, Tr. 69-77) Dr. Sirridge also testified that Horowitz, because of her physical appearance (See photographs, P.Ex. 111-113, Tr. 30), was disadvantaged (App. 83, Tr. 74) and that because of her speech impediment or heavy accent (App. 83, Tr. 73) failed to meet the customary stereotype of female medical students and was thus held to higher standards of performance at the Medical School. (App. 82, Tr. 69) At none of the several meetings of the Council on Evaluation or the Coordinating Committee was Horowitz permitted to defend herself and rebut these allegations.

At no time prior to the filing of this lawsuit was Horowitz allowed to see the evaluations of her performance during any course rotations (App. 102, 111, 123, Tr. 187, 320) nor was she allowed to see or review the doctors' reports made during her rotation. (App. 14, Stip. 40; App. 102, Tr. 112; App. 123, Tr. 230, 320) She never was allowed to appear before any session of the Council on Evaluation or the Coordinating Committee on her own behalf (App. 17, Stips. 52, 53; App. 19-20, Stip. 65; App. 120-121, Tr. 216-217; Tr. 64, 82, 91, 121, 466) nor was she ever informed prior to a meeting when these committees would be considering her status. Her docent, Dr. William Sirridge, was her only contact with her course evaluations. She discussed with him his docent recommendations but she never actually saw them. She assumed they were substantially the same as he discussed with her. (App. 14-15, Stips. 42-44) Dr. Sirridge never told Horowitz that her deficiencies were serious enough to result in her being put on probation, not graduating on time, or being dismissed from school. Dr. Sirridge, as her docent, recommended to the Council on Evaluation that Horowitz be graduated (App. 107, Tr. 144) but she was, instead, dismissed.

Prior to her dismissal, as the Court of Appeals found: "Horowitz was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean, for a hearing during the dismissal procedure, nor was she informed of the time or place of any of their meetings. Neither was she given copies of the formal evaluations or other evidence which the Council and the Committee considered." 538 F.2d at 1320. (App. 53)

Subsequent to her dismissal from medical school, Horowitz was unable to accept the employment that had been offered her by the University of North Carolina School of Medicine because that employment was conditional upon her receiving her medical degree. (App. 16, Stip. 47) It is likely that Horowitz, who presently is unemployed and is taking graduate courses in a non-degree program in the Washington, D.C. area, will never be able to find employment in medicine or a medically related field nor will she ever be able to gain entrance to another medical school. The testimony of Dr. Hilliard Cohen that Horowitz had been stigmatized by her dismissal, that her dismissal was a "significant black mark" against her name, that she would have great difficulty finding employment or obtaining admission to a medical school was uncontroverted at the trial. (App. 61-62, Tr. 25-26) As the Court of Appeals held: "The unrefuted evidence here establishes

that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F.2d at 1321. (App. 55) U.M.K.C., as do nearly all medical schools, requires applicants to explain fully the reasons for being required to leave any prior institution of higher education. (P.Ex. 10, Tr. 223) Horowitz thus cannot escape the allegations made against her by the Medical School, allegations she had no opportunity to refute. The stigma is intensified by the fact that nearly all medical schools have a retention policy. (Tr. 46, Howell Depo. 36-38) Horowitz has applied to several medical schools seeking admission, but her applications have all been rejected. Similarly, she has been unable to find employment in any position related to medical science.

Horowitz brought this action against officials of the University and the district court dismissed her action in an unreported opinion (App. 26) and Horowitz appealed. The Court of Appeals ordered the University officials to provide her with a due process hearing prior to dismissal, 538 F.2d 1317 (8th Cir. 1976) (App. 48) and it is from that order which petitioners now seek relief in this Court.

SUMMARY OF ARGUMENT

I. Respondent, a Medical Student in a Public Institution, Is Entitled to Due Process Before Dismissal From School Where the Dismissal Deprives Her of an Interest in Liberty by Foreclosing Educational and Career Opportunities.

Respondent Horowitz was dismissed from medical school for failure to make improvements in clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism. The dismissal precluded Horowitz from accepting an appointment at the University of North Carolina School of Medicine, caused her to be unable to continue her medical education, and foreclosed for her opportunities in her chosen career.

Horowitz seeks only the protections of minimal due process, notice of the charges against her, an opportunity to defend herself against the allegations before an impartial committee, a statement of the decision of the committee and its reasons therefor, and the protection afforded by some type of record of the hearing. Horowitz seeks such a hearing before a committee of the Medical School where, presumably, educational expertise exists to evaluate the allegations put forth in support of the proposed dismissal in light of the evidence presented. The requirement for such a hearing would not result in an intrusion of the courts into traditional academic affairs but would acknowledge the proper role of educators in providing due process to students facing dismissal for reasons, or under circumstances, likely to foreclose further educational or career opportunities for the student. Such a requirement would, in fact, reaffirm existing law that students, while entitled to due process within educational institutions, may obtain

judicial review of dismissals only where based upon arbitrary, capricious, or bad faith action by school officials. The decision of the Court of Appeals in this case thus represents no significant departure from existing law and should be affirmed.

The Medical School, in dismissing Horowitz, deprived her of her interest in liberty by foreclosing her freedom to take advantage of other educational or employment opportunities. *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). The foreclosure was actual, not possible or speculative as in *Bishop* v. *Wood*, 426 U.S. 341 (1976). Here, Horowitz was denied a position at another medical school and likely has been denied any opportunity to further her education or medical career. Although the district court did not make a finding of fact on the foreclosure issue, the Court of Appeals concluded:

> Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of employment in a medically related field are severely damaged.

538 F.2d at 1321. (App. 55) From the record it is uncontroverted that Horowitz has been foreclosed from a range of opportunities, *Board of Regents* v. *Roth*, 408 U.S. at 574 (1972), in a manner that denied her due process of law, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1956).

The characterization of the dismissal of Horowitz as academic by the Medical School is not relevant to a determination of whether she was entitled to due process. In determining whether due process is required, the Court looks "not to the 'weight' but to the nature of the interests at stake." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-71 (1972). The nature of Horowitz's interest here is her

liberty interest in pursuing her career and whether she was denied that interest for reasons that were characterized as academic as opposed to behavioral is not relevant to the determination of whether due process is required.

The distinction which Petitioners attempt to create between academic and behavioral dismissals does not exist in the law. Courts have declined to review the substance of dismissals where arbitrary or capricious action by school officials was either not alleged or not established, but no court has held, as is the case here, that a school may permanently foreclose chosen career opportunities without due process. Although some courts have referred to a distinction between academic and disciplinary dismissals, such references were not material to the decisions reached and none impaired the concept that due process is required before a range of employment or career opportunities may be foreclosed.

Even if a distinction between academic and behavioral dismissals is recognized, Horowitz was dismissed for reasons which were overwhelmingly conduct-related: clinical competence, peer and patient relationships, personal hygiene, and ability to accept criticism. Of these reasons, only clinical competence is at all related to her academic performance, and even that reason was based upon her appearance and grooming and her slowness in making rounds or coming to class, clearly conduct-related reasons. The remaining reasons were even more closely related to conduct, i.e., getting along with fellow students and faculty, her appearance and her inability to accept criticism. The allegations and disputes underlying these reasons for the dismissal of Horowitz are similar to the factual disputes which have customarily required due process. *Goss* v. *Lopez*, 419 U.S. 565, 575-76 (1975). Nothing less should be permitted here.

II. Petitioners Failed to Provide Respondent With Due Process and Her Summary Dismissal Was Arbitrary and Capricious.

Even if this Court should find that procedural due process was not required prior to the dismissal of Horowitz, this case should be remanded to the Court of Appeals for appellate review of the substantive due process issues which the Court of Appeals explicitly declined to review, 538 F.2d at 1321 n.5. (App. 55)

The Medical School, in dismissing Horowitz, failed to follow its own regulations by not calling Horowitz in for an interview before the Council on Evaluation, as required by the policies of the School. Similarly, the School failed to call together the panel of examining physicians to attempt to resolve their differing opinions after four of the seven doctors recommended that Horowitz either graduate or be continued on probation, even though the procedure established to review the status of Horowitz specifically required that the examining physicians be convened under such circumstances.

The Medical School was arbitrary in dismissing Horowitz when it refused to allow her an opportunity to extend her education at the Medical School even though such extensions, or "decelerations" as they are called at the Medical School, had been routinely granted to other students in order to allow them to acquire or improve clinical skills.

The Medical School also acted arbitrarily in dismissing Horowitz by first giving her credit for successful rotations and later determining, without notice to her, that her performance in such rotations was insufficient and was being used to support her dismissal. Horowitz was thus

arbitrarily led to believe that her work was satisfactory and was therefore unable to improve her work by repeating the rotations, as other students were allowed.

Finally, the dismissal of Horowitz was arbitrary because it was based in large part upon her sex, female, and her personal appearance. Four witnesses testified that Horowitz was a victim of discriminatory application of standards of review to her performance at the Medical School. Prior to her admission to the School, an interviewer had noted that her personal appearance was inappropriate for the Medical School and a professor at the School testified that Horowitz did not fit the stereotype of expectations for a woman in Medical School and was prejudiced in her relations with her peers and with faculty members. Further, Horowitz claims, and the testimony supports the claim, that because of her sex and appearance she was held to standards of achievement and performance that were not expected of male students. In spite of her brilliant academic record, Horowitz was dismissed from the Medical School because, in large part, she did not meet the appearance standards of the institution, in spite of prior knowledge by school officials that her appearance did not fit the program of the school. (P.Ex. 15, Tr. 74)

For these reasons Horowitz was denied substantive due process when she was so summarily dismissed from the Medical School and she is entitled, at the least, to the appellate review of these issues which the Court of Appeals declined to provide when it ruled she was entitled to procedural due process.

ARGUMENT

I. Respondent, a Medical Student in a Public Institution, Is Entitled to Due Process Before Dismissal From School Where the Dismissal Deprives Her of an Interest in Liberty by Foreclosing Educational and Career Opportunities.

Introduction

Charlotte Horowitz was dismissed from Medical School only weeks before the graduation of her class. (App. 22, Stip. 78; App. 112, Tr. 198-199) She was provided neither notice that her dismissal was being considered (App. 116) nor an opportunity to defend herself against adverse allegations. (App. 120-121) The effect of this denial the Eighth Circuit Court of Appeals found from "unrefuted evidence" was that she had been ". . . stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." 538 F.2d at 1321. (App. 55) The dismissal of Horowitz also caused her to lose an appointment at the Department of Psychiatry of the University of North Carolina School of Medicine, which was contingent upon the award to her of a degree from the U.M.K.C. Medical School. (App. 16, Stip. 47) The damage to the education and career of Horowitz was immediate and irreversible, not speculative or temporary. She was accused of having failed to make satisfactory improvements in the areas of clinical competence, peer and patient relations, personal hygiene and ability to accept criticism (App. 18), all without knowledge to her that such accusations were the basis for her proposed dismissal and without any opportunity to learn of and rebut the factual allegations

underlying the accusations. Under these circumstances she was entitled to a due process hearing prior to dismissal from Medical School.

"However little courts may know about education or school discipline, they do know about fact-finding, decision-making, fairness, and procedure." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa.L.Rev. 545 (1971). The requirement that Horowitz be given a hearing does not mean that the courts will interfere with academic evaluations of graduate students as the Medical School argues, Brief of Petitioners at 21, but only that medical schools must organize their own expertise in making decisions concerning the dismissal of students in such a manner as to provide students with an opportunity to learn of and rebut any factual allegations which form the basis of the proposed dismissals. Such a procedure would ensure that decisions of dismissal would be based upon the experience and judgment of educators, and students aggrieved by dismissal would have judicial review only on allegations of arbitrary, capricious, or bad faith exercise of the right of dismissal, judicial review available to all students under present law, as Petitioners concede, Brief of Petitioners at 21-22, *Connelly v. University of Vermont and State Agriculture College*, 244 F.Supp. 156 (D.Vt. 1965).

For this Court to require a hearing before dismissal would neither cause an intrusion of the courts into academic affairs nor change existing law. Petitioners advance the anomalous position that although junior high school students are entitled to a due process hearing before short-term suspensions for disobeying a teacher's instruction, graduate students, whose substantial investment of years of education in preparation for a professional career is in jeopardy, are not entitled to the minimal assurances

of fairness provided by such a hearing as is required for short-term suspensions of fourteen year olds. The argument of Petitioners, however, does not reflect the requirements of due process, requirements observed by the Court of Appeals when it ordered a hearing for Horowitz. Horowitz was entitled to a hearing before she was dismissed from the Medical School where that dismissal foreclosed opportunities for her to further her education or work in her chosen career.

A. Respondent Is Entitled to a Due Process Hearing Before She Is Deprived of Her Interest in Liberty.

This case falls squarely within the rule of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Bishop* v. *Wood*, 426 U.S. 341 (1976). In *Roth*, this Court held that a person is deprived of liberty if the state "forcloses his freedom to take advantage of other employment opportunities." 408 U.S. at 573. *Bishop* v. *Wood* is in accord. That case applied the rule of *Roth* and held that there must be an actual foreclosure, and that nonretention of an employee does not infringe the employee's liberty interest where he "remains as free as before to seek another [position]." *Board of Regents* v. *Roth*, 408 U.S. at 575.

This distinction is an important one. Nearly anything that an employer or school might do to an employee or student respectively could conceivably make the employee or student "somewhat less attractive to . . . employers," *Bishop* v. *Wood*, 426 U.S. at 348, yet such marginal, and often unavoidable effects on future employment prospects do not rise to the level of a Constitutional infirmity.

This distinction between de minimis actions by the state which marginally affect employment opportunities on the one hand, and effective foreclosure of access to

a profession on the other, is the key to the *Roth-Bishop* line of cases. Those cases consistently have held that the former is not a Constitutionally protected liberty interest, but that the latter is. Thus Petitioners misread *Bishop* when they state that because there was no disclosure of the reasons for the dismissal of Charlotte Horowitz, she is not entitled to notice and a hearing. Brief of Petitioners at 17.

The critical factor in *Bishop*, as it was in *Roth*, was not the presence or absence of public disclosure, but rather the fact that both discharged employees "remain[ed] as free as before" to seek other jobs. This was made explicit in *Bishop*, where the Court stated that the "conclusion [embodied in the passage from *Roth* just quoted] applies . . . when there is no public disclosure of the reasons for the discharge." 426 U.S. at 348.

Petitioners' erroneous reading of *Bishop* leads them to argue that absent disclosure of the reasons for dismissal, there is no right to notice and a hearing. In fact, the absence of disclosure is a prerequisite for the application of the *Roth-Bishop* foreclosure standard. Had there been disclosure, *Paul* v. *Davis*, 424 U.S. 693 (1976) would control. However, because the issue in this case is not disclosure or damage to reputation, *Paul* v. *Davis* is irrelevant. That case held that defamatory injury to reputation was not a Constitutional issue, but Horowitz does not base her Constitutional argument on the damage which Petitioners have done to her reputation. Rather, she bases it on Petitioners' foreclosure of her opportunities to pursue her chosen career in psychopharmacology. That foreclosure (in contrast to the discharges in *Roth* and *Bishop* which left the respective employees' employment opportunities undiminished) is a Constitutionally protected liberty interest under the Fourteenth Amendment.

This Court recognized the breadth of the liberty interest protected by the Fourteenth Amendment in *Roth*, and, more recently, in *Ingraham* v. *Wright*, ... U.S. ....., 97 S.Ct. 1401, 1413 (1977). Both of those cases quoted from *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) wherein the Court stated that

> [w]hile this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

The undisputed testimony in this case shows that Horowitz's opportunity to pursue her chosen occupation has been foreclosed in two ways. First, the record shows that as a result of the School's dismissal of her from medical school, Horowitz lost the job which she had been offered by the University of North Carolina. (App. 16, Stip. 47) Thus, unlike *Bishop* v. *Wood*, where this Court could only speculate as to whether the discharged policeman would be able to find alternative employment, here the record is clear. Horowitz had a job in her chosen profession. Petitioner's acts denied her that job. This stark foreclosure of Horowitz's employment opportunities is not remote or speculative. It is an accomplished fact. It is precisely the type of foreclosure which does more than merely make Horowitz somewhat less attractive to employers, but which

actually renders her dramatically less free than before to seek alternative employment.

Horowitz concedes, however, that Petitioners have not gone as far in foreclosing her opportunities as the "horrible hypothetical" alluded to in *Roth*. Petitioners have not "invoke[d] any regulations to bar" Horowitz from practicing her profession in Missouri. But to hold that the liberty interest in pursuing one's chosen profession is infringed only when the state by specific statute or regulation prohibits that person from pursuing his or her occupation is to eviscerate an important aspect of our Constitutionally protected liberty. It would reduce that liberty to a mere protection against Bills of Attainder. Such a dramatic upheaval in Constitutional law is totally unwarranted.

The Court in *Roth* clearly did not believe that only passage of regulations barring a person from employment would constitute a foreclosure of employment opportunities. This is demonstrated both by the holding in the companion case to *Roth*, *Perry* v. *Sindermann*, 408 U.S. 593 (1972) and by the Court's discussion of *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

> The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene[s] . . . Due Process," Schware v. Board of Bar Examiners, 353 U.S. 232, 238 and specifically in a manner that denies the right to a full prior hearing.

Board of Regents v. *Roth*, 408 U.S. at 574 (1972). This is precisely what the Petitioners have done to Horowitz. They have foreclosed a range of opportunities in a manner that contravenes due process.

Second, Horowitz has, as a practical matter, been foreclosed from pursuing her career in psychopharmacological research because, having been dismissed from one medical school, she will find it nearly impossible to gain admission to another. (App. 61-62) Petitioner blandly asserts that Horowitz is free to seek admission to other medical schools. Brief of Petitioners at 18. This misses the point. The issue is not whether she is free to seek admission, but whether she is as free as before to obtain admission to medical school. Clearly she is not.

Moreover, the uncontradicted testimony of Dr. Hilliard Cohen, the director of clinical pathology at the Veterans Administration Hospital in Kansas City and an experienced professor at the University of Kansas Medical School, demonstrates that Horowitz likely will be unable to gain admission to another medical school. Dr. Cohen graphically described how Horowitz would have serious difficulties in obtaining employment in a medically related field. He testified:

> Yes, I would be very much concerned about an individual who was dismissed from a medical school, or, for that matter, from any graduate school. This to me is a very serious matter and I would have to look very carefully into that person's background, record and so forth. And if there were two individuals that, say, that person or someone else were applying and otherwise would have equal qualifications, roughly, I would lean heavily to the other person who was not dismissed from a graduate school.
>
> . . . .
>
> Yes, I think it would be a significant black mark against that person's name, I think it would stigmatize that individual, I think that person would probably

> be—well, would have great difficulty to get into another medical school, if at all. (App. 62)

Moreover, this Court can take judicial notice of the highly competitive nature of medical school admissions today. Where admission to Medical School is so competitive, dismissal ". . . significantly reduces a student's chances of completing his educational program. . . . Furthermore, the dismissal always remains a part of his educational record." *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1154 (1968). Cf. Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J. Law-Ed. 277, 287 n.74 (1976) (stating that the "Dean's Letter" is used by many professional schools to determine if students have ever been disciplined for academic or nonacademic reasons).

The district court did not enter a finding of fact on the issue of whether Horowitz's career opportunities had been foreclosed by Petitioners' acts. The only court below which addressed itself specifically to Horowitz's professional future was the Court of Appeals for the Eighth Circuit, which concluded:

> Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of employment in a medically related field are severely damaged.

Horowitz v. *Board of Curators*, 538 F.2d 1317, 1321 (8th Cir. 1976). (App. 55) The court further emphasized the importance which medical schools attach to prior expulsions by noting that Petitioners' own application forms require every applicant to explain fully any prior dismissals from college or graduate school. *Id.*, at n.3. (App. 54)

This Court has previously held that a similar evidentiary showing is sufficient to establish the presence of

a liberty interest. In *Goss* v. *Lopez*, 419 U.S. 565, 575-76 (1975) the Court stated:

> School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.[7]
>
> . . . .
>
> [7]Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. . . . Appellees also contend that many employers request similar information.

The record establishes in this case that Horowitz's career opportunities were foreclosed, both with respect to the loss of a promised position at the University of North Carolina School of Medicine and because of the severely damaged opportunities for further educational or promotional positions consequent to the nature of her dismissal and the impossibility of preventing other institutions from learning the reasons for her dismissal. For these reasons, Horowitz was deprived of her interest in liberty.

B. The Characterization of the Dismissal As Academic or Disciplinary Is Not Relevant to the Question of the Requirement of Due Process.

Petitioners seem to contend that no process is due Horowitz because the reasons for her dismissal were allegedly "academic." Brief of Petitioners at 15-19. This argument is contrary to the well established holdings of

this Court. It is elementary that in determining whether due process applies, the Court looks "not to the 'weight' but to the *nature* of the interests at stake." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-71 (1972), quoted in *Ingraham* v. *Wright*, ... U.S. ....., 97 S.Ct. 1401, 1413 (1977). The nature of Horowitz's interest is her liberty interest in pursuing her chosen profession. That her opportunity to enter that profession was foreclosed for allegedly academic rather than disciplinary reasons is of no consequence in evaluating the *nature* of her interest.

Moreover, upon close examination the entire dichotomy between academic and disciplinary expulsions collapses. The cases upon which Petitioners rely in support of this false dichotomy are inapposite. In *Gaspar* v. *Bruton*, 513 F.2d 843 (10th Cir. 1975) for example, the defendants sought to discharge a nursing student for clinical deficiencies. Before dismissing her, however, the school provided the student with four separate opportunities to contest the charges against her. She had a conference with the school superintendent at which three members of the school staff were present. She then met with the school board. Third, she was given a hearing before the superintendent at which staff members were present and available for cross-examination. Finally, she had a full evidentiary hearing before the board at which detailed testimony was given and witnesses could be cross-examined. Plaintiff was present at each of these four proceedings. The Tenth Circuit ruled that these elaborate procedures satisfied due process and denied relief. Its statement that the expulsion was really academic and required only notice to the student of the academic deficiencies was hence mere dicta.

In contrast to the *Gaspar* procedures, Charlotte Horowitz was never permitted to be present when her status

as a student was discussed. (App. 17, Stips. 52 and 53) She was never allowed to confront or cross-examine witnesses nor even to meet with the decision-makers. (App. 120-121) In contrast to the four proceedings in which the student could participate which the school in *Gaspar* provided, Petitioners here held a series of secret, ex parte meetings. Petitioners' conduct thus falls far short of both the example set by the school in *Gaspar* and of what is required by the Fourteenth Amendment.

In *Mahavongsana* v. *Hall*, 529 F.2d 448 (7th Cir. 1976), the plaintiff's academic competence was not even the principal issue. There the university had changed its degree requirements after plaintiff had enrolled. Plaintiff maintained that she need only satisfy the degree requirements in effect when she enrolled, while the university contended that she had to meet the newer requirements, which included a comprehensive examination. Plaintiff failed the examination twice, and then filed suit, alleging breach of contract and violation of *substantive* due process. At trial, plaintiff did not even allege a denial of *procedural* due process, and it is procedural, rather than substantive due process which is at issue in the case at bar. Thus the Seventh Circuit's statements about the distinction between academic and disciplinary dismissals are at most an alternative holding, inasmuch as the case was decided on the contract and substantive due process grounds.

Moreover, to the extent that procedural due process was at issue in *Mahavongsana*, the student's rights were accorded more protection by the university there than they were in this case. In *Mahavongsana*, the university gave the student two chances to take the required comprehensive examination. In addition, after she failed the exam both times, the university offered her the opportunity to take additional courses in lieu of the exam. Charlotte

Horowitz was given no such opportunity and has in fact sought such opportunities.

The Seventh Circuit also intimated that an alternative ground for denying plaintiff's claim was her failure to pursue the administrative remedies open to her. The court stated that after the university offered to allow plaintiff to take additional course work she

> nevertheless chose to spurn the university's efforts to tailor a special program to resolve her dilemma. Instead of pursuing her grievance through the administrative remedies provided for in the By-Laws of the Board of Regents of the University, she brought suit.

Id., at 450. Charlotte Horowitz, by contrast, exhausted her administrative remedies before commencing this suit.

Keys v. *Sawyer*, 353 F.Supp. 936 (S.D.Tex. 1973), a case from which Petitioners quote at pages 24-25 of their brief, is also distinguishable. There the plaintiff had voluntarily withdrawn from school and waived his administrative remedies. Moreover, the issues had already been litigated in another action and the judgment in the prior case was res judicata. Hence the passage which Petitioners quote was not necessary to the decision.

Even at that, the quotation is out of context and, as it appears in Petitioners' brief, misleading. The essence of plaintiff's claim in *Keys* was the request that two of his grades be changed because he believed that his professors' grading systems were unfair. It was this challenge to particular grades, rather than a challenge to the dismissal itself, which the court was discussing in the passage which Petitioners quote. This can be seen clearly by placing the language which Petitioners cite in its proper context.

The gravamen of plaintiff's complaints is the basic unfairness of grading systems employed by two individual professors. It is difficult to imagine an area of academic life more suitable for judicial abstention. The assignment of grades to a particular examination must be left to the discretion of the instructor. He should be given the unfettered opportunity to assess a student's performance and determine if it attains a standard of scholarship required by the professor for a satisfactory grade. The federal judiciary should not adjudicate the soundness of a professor's grading system, nor make a factual determination of the fairness of the individual grades. Such an inquiry would necessarily entail the complete substitution of a court evaluation of a complainant's level of achievement in the subject under review, and the standard by which such achievement should be measured, for that of the professor. It would be difficult to prove by reason, logic or common sense that the federal judiciary is either competent, or more competent, to make such an assessment.

Id., at 939-40. Thus the *Keys* court was not, as Petitioners represent, talking about requiring notice and a hearing before expelling a student, but rather about exercising judicial review of particular grades given by particular professors in particular courses. Horowitz, unlike the plaintiff in *Keys*, is not seeking to have the judiciary review her medical qualifications. She is merely asking that she be given the opportunity to answer the charges made against her before the university dismisses her.

In *Connelly* v. *University of Vermont and State Agriculture College*, 244 F.Supp. 156 (D.Vt. 1965), upon which Petitioners rely extensively, the court specifically acknowledged that where the plaintiff alleged that he "was failed

by an instructor who had made up his mind to fail him before he completed the course" he was entitled to a hearing. That is precisely the situation here, since, as Dr. Cohen testified, Dean Noback may have already made up his mind to dismiss Horowitz even before he heard the evaluations of the seven examining physicians. (App. 64)

Finally, Petitioners totally misread *Brookins* v. *Bonnell*, 362 F.Supp. 379 (E.D.Pa. 1973) when they cite it for the proposition that courts should not act where the school chooses to characterize a dismissal as "academic." In fact, the court in *Brookins* actually ordered the school to reinstate the student pending a final order by the court or, alternatively, to give him a full hearing. Thus the *Brookins* court granted the relief which Horowitz seeks in this case.

Moreover, the court recognized that the line between academic and disciplinary expulsions was a faint one at best, and that where, as in the instant case, the essence of the case was a factual dispute revolving around alleged violations of school rules, the student was entitled to the protections of due process. The court's well-reasoned opinion is worth quoting at some length:

> However, the courts are not totally precluded from examining scholastic dismissals. If the student was actually expelled for reasons other than the quality of his work or if the student failed because of bad faith or arbitrary and capricious action by an instructor, the courts will order the granting of a fair and impartial hearing.
>
> The issue is the characterization of plaintiff's alleged failures . . . .

> This case is not the traditional disciplinary situation where the student violates the law or a school regulation by actively engaging in prohibited activities. Plaintiff has allegedly failed to act and comply with school regulations. . . . Like the traditional displinary case, the determination of whether plaintiff did or did not comply with the school regulations is a question of fact. Most importantly, in determining this factual question, reference is not made to a standard of achievement in an esoteric academic field. Scholastic standards are not involved but rather disputed facts concerning whether plaintiff did or did not comply with certain school regulations. These issues adapt themselves readily to determination by a fair and impartial "due process" hearing.
>
> . . . .
>
> Underlying the present controversy appears to be defendants' sincere convictions that the dismissal of plaintiff was for completely proper reasons, and that it would be a waste of time and effort to hold a hearing. Plaintiff, however, contends to the contrary and it is precisely for this reason that final determination of the disputed, or at least unclear facts, cries out for a fair and impartial hearing.

Id., at 382-383.

This case presents just such a factual dispute between a school and a student. The student claims she was discriminated against on the basis of sex and religion and because of her physical appearance over which she had no control. The school claims the student had poor relationships with others; that she did not keep to established schedules nor meet clinical responsibilities gracefully and on time; and that her personal appearance was poor.

The Court should not be misled by Petitioners' labeling of this disputed behavior as "clinical incompetence." That phrase may sound pedagogical, but the questions of whether Horowitz wore clean lab coats or combed her hair or cleaned her fingernails are not determined with reference "to a standard of achievement in an esoteric academic field. Scholastic standards are not involved but rather disputed facts . . . ." *Brookins* v. *Bonnell*, 362 F.Supp. at 383. Hence the instant case presents the classic type of dispute which an open hearing in which the accused may participate is best suited to resolve.

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . .
>
> . . . .
>
> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

Thus this Court should decline to create a difference between those expulsions which purport to be academic and those which purport to be disciplinary, at least in cases like the one at bar where such a difference does not in fact exist. Rather, the Court should look to the facts of each case, examine the nature of the interests involved, and apply the standard for due process mandated by *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The important factor is not the label applied to the dismissal, but the nature of the controversy. And where, as here, the controversy is over an individual's personal cleanliness and attitude, the best way to determine the facts is through a hearing.

If, however, the Court decides to recognize different standards for academic and disciplinary proceedings, Horowitz submits that in her case the expulsion was for disciplinary reasons. The Council on Evaluation placed Horowitz on probation in early summer, 1972, because of her "barely satisfactory work on a pediatrics rotation plus behavioral qualifications." While the first reason might be characterized as academic, the second is clearly disciplinary. The Council decided on December 26, 1972, that Horowitz would not graduate unless she improved in the areas of clinical competence, peer and patient relationships, personal hygiene and ability to accept criticism. (App. 221) Of these four reasons, only clinical competence is at all related to her academic performance.

Petitioners claim that Horowitz was dismissed for clinical incompetence—assertedly an academic rather than a disciplinary reason. Yet the bases for that determination of clinical incompetence were Horowitz's personal appearance and grooming, her position at the end of the line when making rounds, and her slowness in entering the room for class. (Opinion of the United States District Court, App. 34)

Surely the act of being last to come into a classroom is no more an academic failing than is being slow to respond to a teacher's instructions, *Ingraham* v. *Wright*, ... U.S. ....., 97 S.Ct. at 1405, or refusing to leave a school auditorium, *Goss* v. *Lopez*, 419 U.S. at 569. In those two instances this Court characterized the proceedings as disciplinary and held that the protections of due process applied. The actions in controversy here are no less susceptible of characterization as disciplinary than those in *Goss* and *Ingraham*. Petitioners should not be permitted to deprive Horowitz of liberty without due process by the simple expedient of characterizing her dismissal as academic rather than disciplinary. To the extent that the distinction between academic and disciplinary dismissals has meaning, Horowitz's dismissal was for disciplinary reasons.

Ultimately, though, this case should not turn on what are fundamentally problematic and indeterminate classifications. Whether one characterizes the context of Charlotte Horowitz's dismissal as academic or disciplinary, the ultimate issues are factual and behavioral: Was she habitually late for class? Did she decline to participate in clinical activities? Was she discriminated against on the basis of sex or religion? Did her physical appearance unfairly influence the evaluations of her work? These are factual disputes which can be resolved fairly only if Horowitz is afforded the opportunity to confront and cross-examine those who challenge her clinical abilities.

C. The Nature of the Due Process Hearing Required.

Having decided that the nature of Horowitz's interests, rather than an artificial distinction between academic and disciplinary dismissals, determines her right to due process,

the Court must then decide "what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The standard for that determination was laid down by this Court in *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying that standard to this case, it is clear that Horowitz should have been afforded an evidentiary hearing with the opportunity to confront and cross-examine those who alleged that she should not graduate.

The first element of the *Matthews* standard is consideration of the private interest affected by the school's action. As discussed above, that interest is nothing less than Horowitz's right to enter her chosen profession. Horowitz is simply a brilliant woman. As the Eighth Circuit found:

> she has a Bachelor's degree in chemistry from Barnard College and a Master's in psychology from Columbia University. She studied pharmacology at Duke for one year, taking the same curriculum as the first year medical students there. She began as a sophomore at the Women's Medical College of Pennsylvania but withdrew in good standing because of illness her first semester. She also did graduate study and worked

> in the field of psychopharmacology at the National Institute of Health in Bethesda, Maryland for five years. She scored above the 99th percentile on the Graduate Record Examination in Verbal Aptitude, Quantitative Aptitude, Advanced Psychology and Advanced Chemistry. Her scores on the Medical College Admissions Test were also extremely high, with scores in the 99th percentile in the General Information and Science categories. She received excellent recommendations from those with whom she had worked at the National Institute of Health and educators.

538 F.2d at 1318. (App. 48-49) However the School, by expelling her, has shattered Horowitz's professional future. Her private interest in rebuilding that future and hence having the opportunity to fulfill her potential as a scholar and a scientist is of tremendous weight.

Next, *Matthews* requires consideration of the risk of erroneous deprivation and the value of procedural safeguards. That risk is high. The record indicates that Horowitz was the victim of sexual and/or religious discrimination. Dr. Hilliard Cohen, one of the seven physicians who interviewed Horowitz, testified that he was afraid that Dean Noback had already made up his mind about her so that even the ex parte review of her dismissal by the Council on Evaluation would be in vain. Dr. Marjorie Sirridge, a member of the Committee and a professor at the Medical School, voted that Horowitz be continued as a student and expressed concerns about sexual discrimination against her, noting that the Committee had never met with her. (App. 81-82)

Moreover, only two men, Dr. Smull and Dean Noback, controlled the steps which led to Horowitz's expulsion. Dr. Smull initiated the complaints against Horowitz when,

in March 1972, he caused a letter to be sent to her criticizing her performance in the pediatrics rotation. (App. 158, 211) As Chairman of the Council on Evaluation, Smull judged the charges against Horowitz, and he later presented those charges to the Coordinating Committee. (App. 79-80, 115, Tr. 466-467) Dean Noback was Horowitz's liaison with the administration. He had the incompatible responsibilities of helping her fulfill the university's expectations and at the same time judging her as Chairman of the Coordinating Committee. He devised her appeals procedure (Tr. 188-190), while reserving the power to veto any recommendations made. (App. 79, 114)

In light of these indications of conflicting interests and bias, the fundamental safeguards of representation by counsel, confrontation, and cross-examination of witnesses are critical, especially where, as here, the case centers around disputed facts. The probable value of due process procedures in eliminating the risk of erroneous deprivation of Horowitz's interest in her professional career is great; such procedures help assure a ". . . profound attitude of fairness . . ." *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

The final element in the *Matthews* standard is the burden on the Petitioners of requiring a hearing. A simple hearing with opportunity for confrontation, cross-examination, and representation by counsel could undoubtedly have been provided at less cost to Petitioners than the elaborate series of ex parte proceedings which Petitioners employed in this case. Hence, requiring a hearing in this case will not impose a significant additional fiscal or administrative burden on Petitioners in future cases. In fact, Dr. Mary Howell, Associate Dean of Harvard Medical School, testified that due process hearings would promote

the educational mission of medical schools without interfering with their primary purposes. (App. 178-179) Thus, applying the *Matthews* test, Horowitz's private interest in her professional future is great; the risk of erroneous deprivation is large and the protection afforded by procedural safeguards substantial; while the burden on Petitioners is small.

The Court of Appeals correctly held that Horowitz was deprived of a liberty interest in that Petitioners' expulsion of her foreclosed her opportunity to pursue her chosen career. The dictates of procedural due process require that Petitioner provide Horowitz with a hearing at which she may rebut the charges made against her.

D. Pequiring a Due Process Hearing Will Not Entangle the Judiciary in Educational Evaluations.

To require a due process hearing before students are dismissed from educational institutions for academic reasons does not result in substituting a judge's assessment for a teacher's evaluation of the academic progress of students. Clarifying the due process requirement by mandating hearings will assure that academic performance is evaluated not by judges but by educators with academic expertise. Such hearings would be in educational institutions, not courtrooms. It is agreed that teachers are more proficient than students or judges in evaluating academic performance and should make such evaluations.

A due process hearing should require written notice to the student setting forth the basis for the proposed dismissal and offering the student an opportunity to rebut derogatory information or present mitigating circumstances. Such a procedure would provide a record of the reasons for dismissal and serve to prevent attempts

by students to obtain judicial review of the merits of evaluations or other traditional academic decisions. Review by the courts would remain limited, as it is now, to consideration of claims of arbitrary, capricious, or bad faith decision-making. This traditional review would be facilitated by the availability of the record of the due process hearing.

Such a hearing would serve the interests of all parties. The notice requirement would focus the decision-making apparatus of the institution upon the school's mission and the student's accomplishments or failures in that regard. The hearing would permit the resolution of factual issues in the educational institution where access to the documents and personnel involved in evaluations is not burdensome. The student would be permitted to argue the importance of any mitigating circumstances. The informal nature of an administrative hearing would encourage compromises which advance the interests of both the school and the student, an important consideration in light of the policy of most medical schools to help students overcome academic difficulties so that educational investments in students once admitted may ultimately serve the public. Testimony of Dr. Mary Howell. (Howell Depo. 36-38)

In this case a due process hearing prior to dismissal will permit Charlotte Horowitz and the Medical School to resolve issues best suited for resolution within the School by persons with educational expertise. At issue is whether the Medical School treated and evaluated Horowitz more stringently because she was female, as was believed to be the case by an educator at the School, Dr. Marjorie Sirridge (App. 81-84), by an expert witness, Dr. Mary Howell, Associate Dean of Harvard Medical School (App. 175-180), and by Dr. Helene Guttman, Professor of Biological Sciences at the University of Illinois. (App. 136-

139) Also at issue is whether the physical appearance of Horowitz prejudiced her by restricting educational opportunities or adversely affecting her evaluations, as was predicted by an interviewer for the Medical School prior to the admission of Horowitz (P.Ex. 15, Tr. 74), as was believed to be the case by Dr. Marjorie Sirridge (App. 84-84) and as testified to by Dr. Christopher Dennis. (App. 168-173) See photographs of Horowitz, P.Exs. 111, 112, and 113. (Tr. 30)

Also at issue is whether the grading system of the School was changed to the disadvantage of Horowitz by first giving her credit for completion of the pediatrics rotation (App. 12, Stip. 32) and thereafter using her performance in pediatrics to justify in part her dismissal (Tr. 183-184, App. 12, Stip. 33) without informing her or giving her an opportunity to repeat the course. (App. 111-112) Similarly, Horowitz could at a hearing argue in mitigation the appropriateness of lengthening her educational experience, referred to as deceleration by the Medical School, as was offered to other students. (App. 118-119)

Each of these issues is best resolved by a due process hearing, conducted by persons with educational expertise for such informal but adversary hearings, which facilitates the resolution of factual issues, Fuller, *The Adversary System*, Talks on American Law 35 (Berman ed. 1972), and permit a student to "characterize his conduct", *Goss* v. *Lopez*, 419 U.S. 565, 584 (1975), in mitigation of the threatened dismissal. Cf. *Betts* v. *Board of Education*, 466 F.2d 629, 633 (7th Cir. 1972).

Petitioners can hardly argue that such a due process hearing would unduly burden the Medical School. It likely would require far less time and expense than the Medical School's review panel of seven physicians which

related only to the question of whether to graduate Horowitz but not to the decision to dismiss her, and, being advisory, had no actual authority as noted by the Court of Appeals, 538 F.2d at 1321 n. 4. (App. 55) A sister medical school under the supervision and control of Petitioners, at Columbia, Missouri, has, since prior to the trial in this case, provided due process hearings to students faced with dismissal. *Lukacs* v. *Curators of the Univ. of Missouri*, No. 74CV109-2 (W.D.Mo. July 23, 1974), cited in Dessem, *supra* at 281 and 299 n. 130. Also, it is believed that for the last two years the Medical School from which Horowitz was dismissed has provided due process hearings to several students threatened with dismissal.

Due process hearings are neither particularly burdensome nor expensive; they help assure fundamental fairness by focusing dismissal proceedings upon important issues; they offer students and schools opportunities to select courses of action less severe than dismissal and thereby salvage important investments in specialized training; and, they promote the overall mission of professional schools by demonstrating the democratic ideal of fairness, in addition to teaching it. Due process ". . . compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess . . .", *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring), serves both the interests of students and advances the purposes of educators, without sacrificing any of the independence and academic freedom traditionally accorded to educational institutions. The Court of Appeals properly ordered that the Medical School provide Horowitz with a due process hearing and this Court should either affirm that order or dismiss the writ of certiorari as improvidently granted.

II. Petitioners Failed to Provide Respondent With Due Process and Her Summary Dismissal Was Arbitrary and Capricious.

Introduction

Horowitz was provided neither notice nor an opportunity for a hearing prior to her dismissal from the Medical School. (App. 17, Stip. 52) As the Court of Appeals found:

> Horowitz was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean, for a hearing during the dismissal procedure, nor was she informed of the time or place of any of their meetings. Neither was she given copies of the formal evaluations or other evidence which the Council and the Committee considered.

538 F.2d 1320. (App. 53) The so-called "appeal" procedure by which Horowitz was examined by seven physicians related only to the decision that she not graduate, 538 F.2d at 1321 n. 4 (App. 55), not to the later decision to dismiss her. (App. 18-22, Stips. 58, 67, 71, 73 and 77) Thus, it is uncontroverted that Horowitz was not provided with notice of the grounds for her dismissal or an opportunity to rebut those grounds prior to the decision to dismiss her.

The decision to dismiss Horowitz from the Medical School was made in an arbitrary and capricious manner and should this Court find that Horowitz was not entitled to notice and an opportunity for a hearing prior to dismissal, this cause should be remanded to the Court of Appeals for consideration of the substantive due process claims of Horowitz which the Court of Appeals explicitly declined to rule upon, 538 F.2d at 1321 n. 5. (App. 55)

The substantive due process claims of Horowitz include the failure of the Medical School to follow its own rules and regulations in dismissing her, the decision to exclude Horowitz from the option of extending her education at the School even though that option was offered to other students, the alteration by the School of the standards by which Horowitz was evaluated and the *ex post facto* application of new standards to the performance of Horowitz, the discriminatory evaluation of Horowitz based upon her sex and physical appearance, and the arbitrary nature of the assessment of her clinical competence. The courts may overturn the dismissal of a student on substantive due process grounds where such dismissal is arbitrary and capricious. *Greenhill* v. *Bailey*, 519 F.2d 5, 10 n. 12 (8th Cir. 1975). Horowitz is entitled to an appellate review of such issues if this Court should fail to sustain her procedural due process claim based upon her substantive claims in the following respects.

A. The Medical School Failed to Follow Its Own Rules and Regulations in Dismissing Horowitz.

Where institutions grant procedural protection in excess of the protections required by law, such institutions must follow their own procedure. *Service* v. *Dulles*, 354 U.S. 363 (1957). See also *Behagen* v. *Inter-Collegiate Conference of Faculty Representatives*, 346 F.Supp. 602 (D.Minn. 1972), where the court stated:

> It is elemental that action beyond the scope of a body's own procedural regulations is in violation of due process of law.

Similarly, in *Warren* v. *National Association of Secondary School Principals*, 375 F.Supp. 1043 (N.D.Tex. 1974), it was held that where an educational institution creates procedural rights above a constitutional minimum, its own

rules proscribe the boundaries of due process. The dismissal of Horowitz from the Medical School was deficient when measured against its own rules and regulations in two respects.

First, Provost Dimond circulated a memorandum setting forth newly promulgated procedures of the Medical School relating to the evaluation of students and the status of students at the Medical School. (P.Ex. 46, Tr. 177) This memorandum was made available to students in the December 11, 1972 *School of Medicine Newsletter* and set out the procedures to be followed regarding a student's probation or removal from school. (App. 16-17, Stip. 48) Paragraph 7 of this letter provided that the Council on Evaluation would normally review three sources of information: evaluations of the students, results of quarterly examinations, and the recommendations of the docent for each student. The procedure provided, further, that if the Council on Evaluation "finds itself operating without adequate information, it has the responsibility of calling the student forward for an interview. . ." The Council on Evaluation did, in fact, find "itself operating without adequate information", and utilized two additional sources of information: the results of the examinations of the seven examining physicians (App. 116-117, Tr. 206-208) and peer evaluations of Horowitz. (Tr. 178) Peer evaluations were made by students when "students are on concurrent assignments in any of the major curriculum rotations." (Tr. 178) Dean Noback also testified that peer evaluations put "in the hands of the Evaluation Council on a sequential basis the assessment of individuals about the performance characteristics of the students. . ." (Tr. 178)

Even though the Council on Evaluation thus acquired additional information beyond the three usual sources, it

failed to call Horowitz forward for an interview as required by its own rules and regulations. Thus, Horowitz was denied the only opportunity for a hearing which the rules provided to her in a situation where her status at the school was in jeopardy. Failure of a medical school to follow its own regulations was arbitrary and deprived Horowitz of due process.

Secondly, the Medical School failed to follow its own procedures for determining the results of a set of oral and practical examinations administered to Horowitz. On March 15, 1972, Dean Noback sent a letter to each of seven physicians who had been asked to give oral and practical examinations to Horowitz. (P.Ex. 58, Tr. 18) This letter of instruction asked the physicians to reach one of three possible recommendations: that she graduate on schedule, that she remain on probation, or that she be dropped from the Medical School. Simultaneously, Dean Noback prepared a memorandum establishing the procedure for compiling the recommendations of the panel of examining physicians. (P.Ex. 59, Tr. 189) This memorandum "became an additional part of operating procedure" (Tr. 189) and stated that a majority of the recommendations of the examining panel would determine the judgment of the panel. Further, if there was not a majority opinion, the Dean would call the panel together promptly to discuss the evaluation of the individual student and to solve differences in judgment among the examining physicians.

The letters of the seven examining physicians (P.Exs. 60, 61, 63, 64, 65, 66, and 68, Tr. 35 and 202), when divided among the three possible recommendations required by Dean Noback (P.Ex. 58, Tr. 18) reveal there is clearly no majority for any one of the three recommendations. Two doctors recommended that Horowitz be graduated

immediately, two recommended that she be dismissed from the School, and three doctors recommended that she continue in school on probation. (App. 113, Tr. 200) The tallying regulation of the Medical School (P.Ex. 59, Tr. 189) provided that if there was no majority opinion then the panel would be called together to discuss the situation and the evaluation of the student. The seven examining physicians were never called together to participate in any type of discussion concerning Horowitz (App. 73, Tr. 47-48) nor did they consult with each other. (App. 73)

The Medical School failed to follow its own rules by not carrying out the further requirements of the tallying regulation for a conference of the examining physicians to discuss the evaluation of Horowitz and to resolve differences of opinion, of which there were many. Such a group discussion, as required by the regulation might well have benefited Horowitz by resulting in a consensus that she be given some additional time to acquire those skills in which she was deemed deficient. The failure of the Medical School to carry out the announced procedure denied Horowitz the possible benefits of the examining procedure she reasonably could expect as announced and outlined in the regulations of the Medical School. This departure from the Medical School's printed procedures was in itself a denial of due process.

Thus, in two important respects Horowitz was denied the protection ostensibly accorded to students at the Medical School by the institution's own rules and regulations. She was not called in for an interview before the Council on Evaluation and was thus denied her only opportunity for even the semblance of a hearing. In addition, after her clinical skills were reviewed by a panel of examining physicians, the Medical School failed to follow its own procedure for evaluating the results of that review process.

Each of these failures substantially prejudiced the ability of Horowitz to protect her status at the Medical School. The failure of the School in these two respects was especially harmful to her where the regulations of the School did not otherwise provide means for Horowitz to rebut allegations against her or to present her view of factual controversies. Thus, even the extremely minimal procedural protections afforded by the School's own rules, particularly important in light of the paucity of other procedural protections, were denied her.

B. The Medical School Summarily Excluded the "Deceleration" Option.

The dismissal of Horowitz was also arbitrary and capricious in a second major regard. Although several other students at this relatively new Medical School had been "decelerated" in their studies, such an option was not made available to Horowitz. Dean Noback conceded in his testimony that students at the Medical School had been "decelerated" in their progress through the School, a term that means they were given additional time to complete their education and make up courses in which their performance had been unsatisfactory. (App. 118-119, Tr. 213-214) The practical effect of such a deceleration is to extend the stay of such students at the Medical School and the purpose of it is to allow such students to obtain skills they otherwise did not possess. It provides an opportunity for students to obtain clinical skills, master concepts, learn facts, and acquire all the other usual attributes of a medical education. Dr. Marjorie Sirridge testified that not only did this Medical School provide opportunities to students to extend their education, but such opportunities are available in traditional medical schools as well. (App. 80-81, Tr. 66-68) The failure similarly

to provide an opportunity for Horowitz to extend her stay at the Medical School to master those skills or concepts in which she was deemed to be deficient was arbitrary. It was especially arbitrary under these circumstances where the Medical School, having not yet fully detailed its procedures for reviewing the status of students, had effectively precluded students from advancing their positions at a hearing before committees reviewing their status. Thus, where the "deceleration" option could be extended to students, the denial by the Medical School of an opportunity to Horowitz to appear before any of the evaluation committee meetings and present her case and, perhaps, argue the appropriateness of deceleration under the circumstances of her studies, makes the decision to dismiss her all the more arbitrary.

C. The Medical School Arbitrarily Changed Its Standards of Evaluation and Applied Them Ex Post Facto.

The decision to dismiss Horowitz was arbitrary for a third significant reason. The standards by which the performance of Horowitz at the Medical School was measured were altered during the course of her studies. In the Spring of her first year at the Medical School, Horowitz spent two months in the Pediatrics rotation for which she received a "credit" on her transcript immediately upon completion of the course. (App. 12, Stip. 32) In spite of the fact that Horowitz had received credit for completion of the Pediatrics rotation, the Medical School, when considering her dismissal a year after her completion of the Pediatrics rotation, deemed her performance in that course to have been unsatisfactory. (App. 12, Stip. 33) Prior, however, to her dismissal from the Medical School, she had never been provided copies of the evaluation re-

ports concerning Pediatrics. (App. 14, Stip. 40) Thus, Horowitz reasonably thought at the completion of her Pediatrics rotation that her performance had been satisfactory because the School in choosing to signify her completion of the course on her permanent transcript had chosen the notation "credit" from among three possible notations, credit, no-credit, and incomplete. Although her docent and the Dean at some point in time learned that her performance in Pediatrics was being held against her in the consideration of her dismissal from the Medical School, she was never informed that her performance was unsatisfactory and, therefore, she did not have an opportunity to seek permission to repeat the rotation even though such permission might well have been granted. (App. 111-112, Tr. 187-188) Even her docent did not know that Horowitz's performance in Pediatrics was deemed unsatisfactory. (Tr. 112) The failure to advise Horowitz that her "credit" in Pediatrics was being used in part to justify her dismissal and thus preventing her from seeking permission to repeat the rotation was especially damaging to her because the Medical School does not specify requirements for graduation in terms of successful completion of any number of courses, nor does the Medical School specify non-graduation for failure to complete a course or courses successfully (App. 25, Stip. 92), and Horowitz completed all of her courses. (App. 25, Stip. 86)

The practical effect of giving Horowitz credit for completing the Pediatrics course and then holding her performance in that course against her was to impose, ex post facto, a significant change in the standards of evaluation applied to Horowitz without giving her an opportunity to correct any deficiencies revealed by the more stringent standard adopted. Thus the ex post facto imposition of a new standard of review was arbitrary and capricious

and worked to the substantial detriment of Horowitz when her status at the Medical School was reviewed, without notice to her, in May, 1973.

Similarly, in the Spring of her final year at the Medical School, Horowitz participated in a Surgery rotation and in an Obstetrics-Gynecology rotation and her performance in those rotations was deemed to have been satisfactory. (Tr. 431-433) In spite of her satisfactory performance in these rotations Dean Noback testified that in making the decision to dismiss her from the Medical School these two rotations had "impacted negatively" upon her status at the Medical School. (Tr. 431-433) Again, Horowitz was subject, to her detriment, to a changing standard of evaluation. Whereas her performance in these two rotations had been deemed satisfactory at the completion of each course they were later utilized by the Medical School as evidence supporting her dismissal because they had not been satisfactory enough.

Such an alteration in the standards by which her performance was measured resulted in an arbitrary and capricious decision to dismiss her. Horowitz was entitled to rely upon her expectancy that the Medical School would not change the standards by which her performance was evaluated without notice to her. She was entitled to rely upon her expectation that new standards of evaluation would not be retroactively applied to her. The changes in evaluation adopted by the Medical School thus deprived Horowitz of a property interest in the completion of her education without arbitrary alterations in policy. Where the changes in policy resulted in the dismissal of Horowitz from the Medical School, she was denied due process of law where no opportunity for a hearing was provided. *Perry* v. *Sindermann*, 408 U.S. 593 (1972).

D. The Dismissal of Horowitz Was Especially Arbitrary and Capricious.

The dismissal of Horowitz from the Medical School is made all the more egregious when the failure to provide her notice and an opportunity for a hearing, failure to allow her the "deceleration" option, failure to accept the judgment of a majority of the seven examining physicians, and the application of shifting standards to the evaluation of her performance in her courses are viewed in context of the total experience of Horowitz at the Medical School.

The Medical School was established in 1971 as an experimental school designed to educate students to become "safe" physicians who had an orientation to the delivery of primary health care, either as family physicians, general practitioners, or clinicians. It was further hoped that the Medical School would produce physicians to deliver medical care where it was most needed, in rural areas and in heavily populated urban centers. In spite of this conscious design to produce primary care oriented physicians, Horowitz was admitted as an advanced standing student with an expressed interest in research and a disinclination for concentration on "clinical instruction." (P.Ex. 10, Tr. 223) One of the two interviewers who met with Horowitz before her admission to the Medical School rated her good, very good, or excellent in all categories with the exception of personal appearance which was noted to be unsatisfactory. The interviewer wrote at the bottom of the interview sheet the following:

> The candidates (sic) personal appearance is against her—her interests in medicine are psychiatry—wants to teach in a med school—she has a slight speech impediment—I don't believe she fits our program.

(P.Ex. 15, Tr. 74). See photographs of Horowitz, P.Exs. 111, 112 and 113 at Tr. 30. In spite of the knowledge of at least some persons at the Medical School of the inappropriateness of Horowitz for the clinically oriented structure of the Medical School, she was admitted nevertheless. Her docent, Dr. William Sirridge, testified that if he had known of this interview report, Horowitz would not have been admitted to the Medical School. (App. 110, Tr. 172)

Dr. Marjorie Sirridge testified that the physical appearance of Horowitz was a drawback to her at the Medical School in that it interfered with her clinical practice of medicine even though it was not an appropriate standard by which to measure a "safe" physician. (App. 83-84, Tr. 74-75) Horowitz's docent, Dr. William Sirridge, testified that to a certain extent the observation that Horowitz had become a class joke was correct and that in part this difficulty may have been caused by her physical appearance. (App. 98-99, Tr. 104-105) Dr. Dennis testified that Horowitz was overweight, unattractive, unkempt, but not uncleanly, had a speech impediment, and was the joke of the Medical School (App. 169-170, Dennis Depo. 7-10) in spite of her outstanding academic achievements. For these reasons a considerable amount of ill will was generated against her, among those students and a few faculty members, some of whom were in positions to influence her dismissal. (App. 169-173 and Dennis Depo. 22-27)

The physical appearance of Horowitz also resulted in the application of evaluation standards to her performance that were more stringent than applied to male students. Dr. Marjorie Sirridge, a professor at the Medical School and a member of the Coordinating Committee, testified that Horowitz was disadvantaged at the Medical School

by her appearance because she did not exemplify what was expected of female medical students (App. 81-82, Tr. 69-70) and because of an unattractive physical appearance and a speech impediment or heavy accent. (App. 83, Tr. 73-74) Dr. Sirridge testified that Horowitz's physical appearance was a drawback to her at the Medical School and interfered with the clinical practice of medicine even though appearance was not an appropriate standard to measure the competence of a physician. (App. 83-84, Tr. 74-77)

Dr. William Sirridge, Horowitz's docent, testified that Horowitz was disadvantaged at the Medical School by her appearance and her sex. (App. 106-107, Tr. 132) Similarly, witnesses Dr. Mary Howell, Associate Dean of Harvard Medical School, and Dr. Helene Guttman testified that Horowitz had been prejudiced by her sex. (App. 175-180, 136-139)

Thus it appears that in spite of her excellent academic and scholastic achievements, it became apparent to the Medical School that Horowitz had neither the requisite personality nor appropriate physical appearance to be a "safe physician" in the mold in which the school was casting its students. Indeed, it was stated the third month of her medical education by a member of the Evaluation Council that Horowitz did not have the charisma to be a physician. (Dennis Depo. 23-24) Once a determination had been made that she was not appropriate, her dismissal became a certainty and she was dismissed notwithstanding some procedural niceties. These included the problems created by such facts as the continued recommendations of her docent that she graduate (App. 107) or the credit she had earned in rotations, or the majority judgment of the seven examining physicians that she either graduate or be continued on probation. When viewed in this context the

Medical School, by not allowing her the option of "deceleration", by not giving weight to the judgment of the examining physicians, and by imposing upon her shifting standards of evaluation, acted arbitrarily and capriciously when it dismissed Horowitz.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed or the Writ of Certiorari herein should be dismissed as having been improvidently granted. In the alternative, if the decision of the Court of Appeals is reversed, this cause should be remanded to the Court of Appeals for consideration of the substantive due process issues raised by Respondent.

Respectfully submitted,

ARTHUR A. BENSON II
2525 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
816/842-7603
Attorney for Respondent

Counsel for Respondent gratefully acknowledges the assistance of Alan P. Sherbrooke and his fellow students at Harvard Law School in preparation of portions of this Brief.